TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 559.

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

NINETY-FIVE BARRELS, MORE OR LESS, ALLEGED APPLE CIDER VINEGAR, DOUGLAS PACKING COMPANY, CLAIMANT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1923.
CERTIORARI AND RETURN FILED NOVEMBER 6, 1923.

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1 [Caption omitted.]

2 In United States District Court.

Libel of information in forfeiture.

Filed Jan. 12, 1920.

E. S. Wertz, United States attorney for the Northern District of Ohio, who, for the United States in this behalf prosecutes, exhibits this, his information against ninety-five barrels, more or less, alleged apple cider vinegar, heretofore shipped in interstate commerce by the Douglas Packing Co., from Fairport, N. Y., to Fisher Bros., Cleveland, in the State of Ohio, by way of the New York Central Railroad Company, a common carrier, engaged in carrying freight from one State of the United States to another State of the United States, and particularly from said Fairport, N. Y., to said Cleveland, Ohio; said ninety-five barrels, more or less, alleged apple cider vinegar, received as aforesaid, in interstate commerce into the said city of Cleveland, by way of the said New York Central Railroad Company, are now in the possession of Fisher Bros. at Cleveland, Ohio; and thereupon said United States attorney does allege and give the court to understand and be informed as follows:

I.

That the aforesaid barrels of vinegar are labeled on one top of the barrel as follows:

" Douglas Packing Company
Excelsior vinegar made from selected apples
Four per centum
Rochester, N. Y."

that the other end of the aforesaid barrels of vingar are labeled as follows:

" Manufactured to comply with all pure food laws
Douglas Packing Company,
Rochester, N. Y."

That analysis of the sample shows the product consists wholly or in part of vinegar made from evaporated or dried apples; which said vinegar is adulterated and misbranded within the meaning of and contrary to the provisions of the act of Congress of June 30, 1906, commonly known and designated as the food and drugs act, in the following particulars, viz:

(a) That the said ninety-five barrels, more or less, alleged apple cider vinegar, labeled as aforesaid, are adulterated, in that
3 vinegar made from evaporated or dried apple products has been mixed and packed with and substituted wholly or in part for the article, contrary to and in violation of paragraphs first and second under food, of section 7, of the food and drugs act aforesaid.

(b) That the said ninety-five barrels, more or less, alleged apple cider vinegar, labeled as aforesaid, are misbranded, in that the statements on label "Vinegar made from selected apples and manufactured to comply with all pure food laws," are false and misleading and deceive and mislead the purchaser, since analysis shows the above results, contrary to and in violation of paragraphs second and fourth under food, of section 8, and general paragraph, of section 8, of the food and drugs act aforesaid.

(c) That the said ninety-five barrels, more or less, alleged apple cider vinegar, labeled as aforesaid, are further misbranded, in that it is an imitation of and offered for sale under the distinctive name of another article, to wit, apple cider vinegar, contrary to and in violation of paragraph first, of section 8, of the food and drugs act aforesaid.

And wherefore said attorney says that the said ninety-five barrels, more or less, alleged apple cider vinegar, labeled as aforesaid, are adulterated and misbranded within the meaning of the said act of Congress and are subject to seizure and confiscation within the meaning of and intent of section 10 of the said act.

II.

That the said ninety-five barrels, more or less, alleged apple cider vinegar, as aforesaid, were shipped on or about November 24, 1919, in interstate commerce from the Douglas Packing Co., Fairport, N. Y., via the New York Central Railroad Company to Fisher Bros., Cleveland, Ohio, in the division and district aforesaid, and within the jurisdiction of this court.

That the said attorney of the United States who prosecutes as aforesaid for the United States, says that all and sigular the premises are true, and that the said ninety-five barrels, more or less, alleged apple cider vinegar, are now within the jurisdiction of the United States and of this court.

Wherefore, for the United States, said attorney prays that a writ of attachment and monition in due form of law according
4 to the course of this court in such cases, may be issued against said product, and that all persons having any interest in the same may be cited to appear and answer all and singular the matters aforesaid, and that said products may be seized for confiscation by process of libel of condemnation, and that if such product contained therein is condemned as being adulterated and misbranded within the meaning of said food and drugs act of June 30, 1906, that the same may be disposed of by destruction or sale as the court may direct, and that the proceeds thereof, if sold, less the legal costs and charges, may be put into the Treasury of the United State.

E. S. WERTZ,
United States Attorney.

[Jurat showing the foregoing was duly sworn to by E. S. Wertz, omitted in printing.]

Praecipe.

Filed Jan. 12, 1920.

To the Clerk:

Please issue warrant of seizure and monition herein against ninety-five barrels, more or less, alleged apple cider vinegar, and summons for service to the Douglas Packing Co., Fairport, N. Y., and to Fisher Bros., of Cleveland, Ohio, and all other persons concerned herein. This ____ day of January, 1920.

E. S. WERTZ,
United States Attorney.

5 In United States District Court.

Stipulation, amending libel.

It is hereby stipulated and agreed by and between the undersigned counsel for the respective parties hereto that the libel filed herein for the United States may be corrected and amended in the following particulars:

1. Insert on page one in lieu of the label quoted the following corrected recital of the label appearing in said barrels of vinegar herein described:

" Douglas Packing Company
Excelsior Brand apple cider vinegar made
from selected apples
Reduced to 4 per centum
Rochester, N. Y.
Guaranteed to comply with all pure food laws
Douglas Packing Company
Rochester, N. Y."

2. Insert on page two, line twenty-two subparagraph (b) the word " guaranteed " in lieu of the word " manufactured."

It is further stipulated and agreed by said counsel that the demurrer heretofore filed herein may stand to the libel as above amended, and that the hearing and argument proceed thereon on April 1, 1922, as originally set.

JOSEPH C. BREITENSTEIN,
Asst. U. S. States Attorney.
WHITE, JOHNSON, CANNON & SPIETH,
Attorney for Douglas Packing Company, Claimant.

In United States District Court.

Amendments to libel.

Now comes E. S. Wertz, attorney for the libellant, and in accordance with the stipulations filed herein amends the libel of information heretofore filed, in the following particulars:

6 I.

By inserting on page 1 and 2, in lieu of the label quoted, the following recital of the label appearing on said barrels of vinegar described therein:

"Douglas Packing Company
Excelsior Brand apple cider vinegar made
from selected apples
Reduced to 4 per centum
Rochester, N. Y.
Guaranteed to comply with all pure food laws
Douglas Packing Company
Rochester, N. Y."

II.

By inserting on page 2, line 22, subparagraph "b," the word "guaranteed" in lieu of the word "manufactured."

JOSEPH C. BREITENSTEIN,
Asst. U. S. States Attorney.

In United States District Court.

Claim of Douglas Packing Company.

Filed April 12, 1920.

Comes now the Douglas Packing Company and represents unto this court that it is the owner of the ninety-five barrels, more or less, apple cider vinegar seized in the above entitled action, and that no other person, firm, or corporation has any interest in said vinegar other than itself, and prays this honorable court that said claimant shall have restitution of the said ninety-five barrels, more or less, apple cider vinegar, and for such other and further relief as to the court may seem meet.

DOUGLAS PACKING COMPANY,
By WHITE, JOHNSON, CANNON & SPIETH,
Its Attorneys and Proctors.

7 [Jurat showing the foregoing was duly sworn to by Earl J. Neville omitted in printing.]

8 In United States District Court.

Answer of Douglas Packing Company, Claimant.

Filed April 16, 1920; refiled August 22, 1922.

And now comes the claimant, the Douglas Packing Company, by White, Johnson, Cannon, and Spieth, its attorneys, and for answer to the libel of the United States of America filed herein, says:

That it is a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of said State.

I.

Claimant denies the averments in Article I of said libel in the manner and form as therein set forth, and avers the fact is that said barrels of vinegar, libeled herein, are labeled on one end of the barrel as follows:

"Douglas Packing Company
Excelsior Brand apple cider vinegar
Made from selected apples
Reduced to 4 per centum
Rochester, New York."

and that the other end of said barrels of vinegar are labeled as follows:

"Guaranteed to comply with all
Pure food laws.
Douglas Packing Company,
Rochester, New York."

Claimant admits that evaporated apples were used in the manufacture of said vinegar, but alleges the fact to be that said vinegar is nevertheless pure apple cider vinegar.

It denies that said vinegar is adulterated and misbranded, within the meaning of and contrary to the provisions of the act of Congress of June 30, 1906, commonly known and designated as the food and drugs act, and particularly denies:

(a) That said vinegar, though evaporated apples were used in the manufacture thereof, is adulterated contrary to and in violation of paragraphs first and second under food, of section 7 of the food and drugs act, aforesaid.

9 (b) That said vinegar is misbranded contrary to and in violation of paragraphs second and fourth under food of section 8, and general paragraph of section 8 of the food and drugs act, as aforesaid; and alleges the fact to be that the statements on said labels

"Excelsior Brand apple cider vinegar
Made from selected apples"

and

"Guaranteed to comply with all
Pure food laws"

are true and correct, and claimant denies that said words and figures are false and misleading, and deceive and mislead the purchaser as alleged in subhead B of paragraph I of said libel.

(c) That said vinegar is further misbranded in that it is an imitation of and offered for sale under the distinctive name of another article, to wit: "Apple cider vinegar," contrary to and in violation of paragraph first of section 8 of the food and drugs act, aforesaid.

Claimant again avers and insists that said vinegar is pure apple cider vinegar, and denies that it is subject to seizure and confiscation within the meaning and intent of Section 10 of said Act.

II.

Claimant admits that said barrels of apple cider vinegar, as aforesaid, were shipped in interstate commerce by it from Fairport, New York, to Fisher Brothers, Cleveland, in the State of Ohio, in the division and district aforesaid, via the New York Central Railroad Company on or about November 24, 1919, as averred in paragraph II of said libel, and that said apple cider vinegar was at the time of the commencement of this action, and still is, within the jurisdiction of the United States and of this court.

III.

It denies that the averments of said libel are true, save as hereinbefore admitted, and avers that the charges in relation thereto are as hereinbefore set forth.

Therefore, claimant prays that this honorable court will pronounce against the demand of the libelant in this libel mention, with costs.

WHITE, JOHNSON, CANNON & SPIETH,
Attorneys for Plaintiff.

10 [Jurat showing the foregoing was duly sworn to by Earl J. Neville omitted in printing.]

11 In United States District Court.

Application by claimant, Douglas Packing Company.

Filed Jan. 30, 1922.

Now comes the claimant, The Douglas Packing Company, and moves the court for an order permitting it to withdraw the answer which it heretofore filed in this case and granting leave to file its demurrer instanter.

WHITE, JOHNSON, CANNON & SPIETH,
Attorneys for Douglas Packing Co.

In United States District Court.

Order granting motion to withdraw answer.

Entered Jan. 30, 1922, by D. C. Westenhaver, Judge.

This matter came on this day to be heard, on the application of The Douglas Packing Company for leave to withdraw its answer and to file a demurrer, and on due consideration, the court being fully advised in the premises, said motion is granted.

In United States District Court.

Demurrer by Douglas Packing Company to libel of information.

Filed Jan. 30, 1922.

Now comes the claimant, DOUGLAS PACKING COMPANY, by its attorneys, WHITE, JOHNSON, CANNON & SPIETH, and demurs to the libel of information in forfeiture, and for cause says:—

Said libel does not state facts constituting a cause of action and warranting the relief prayed for.

WHITE, JOHNSON, CANNON & SPIETH,
Attorneys for Douglas Packing Co.

12 In United States District Court.

Opinion of court on demurrer.

Filed April 29, 1922.

WESTENHAVER, *J.*

The Court: This case was argued and submitted on a general demurrer by the defendant to the libel. At the time it was submitted counsel for defendant announced that the defendant desired a trial of the case on the merits at the time the case was assigned for trial on the calendar, in the event this demurrer should be overruled. Whether that trial can be had, even if the demurrer is overruled, depends upon the state of the trial calendar, and if the trial is to be before a jury, and upon oral testimony, I foresee that it will not be possible to meet with the wishes of counsel. However, in order that the case may be placed in condition for trial as soon as possible, I have decided to dispose of the demurrer now by an oral announcement, foregoing my original purpose of making an extended consideration of the authorities cited and filing a written memorandum.

The libel charges that the ninety-five barrels of vinegar in question were adulterated and misbranded under the pure food and drugs act. The libel shows that branding to be as follows:

"Douglas Packing Company
Excelsior Brand apple cider vinegar made
from selected apples
Reduced to four per centum,
Rochester, N. Y.
Guaranteed to comply with all pure food laws
Douglas Packing Company,
Rochester, N. Y."

The libel further alleges that the product thus labeled consisted in whole, or in part, of vinegar made from evaporated or dried fruit, and that vinegar thus made from evaporated or dried fruit is an adulteration of vinegar within the meaning of the food and drugs act. Whether this is in fact an adulteration, I am not at this time prepared to say. The case of adulteration is not so strong as is the case made by the libel as to the misbranding, and it is on this latter ground that I feel the demurrer must be overruled.

Respecting the misbranding, the allegations of the libel are that these ninety-five barrels of alleged apple cider vinegar are misbranded in that the statements of label represent that it is
13 apple cider vinegar made from selected apples and manufactured to comply with all pure food laws, including therein State as well as national food laws; that these allegations are false and misleading and tend to deceive and mislead the purchaser, since the analysis shows that the vinegar was made in part, at least, from evaporated or dried fruit; also that this label is misleading in that the product to which the label is applied is an imitation of, and offered for sale under the distinctive name of another article, to wit, apple cider vinegar. These allegations of the libel characterize and interpret, in a general way, the alleged misleading brand.

It is further averred that cider, or vinegar made from evaporated or dried apples, is not the same thing as apple cider vinegar made from the fresh juice of fresh apples, and that this label conveys to the ordinary purchaser, the general public which buys and uses vinegar, the false, erroneous and misleading impression that it is made from the fresh juice, or cider, of fresh apples. It is true that these general allegations are an interpretation, or characterization, of the words of the label, but at the same time it is settled law that general allegations are sufficient in the absence of an allegation to make more definite and certain, and will sustain a pleading against a general demurrer. In the face of these allegations I could not well, on demurrer, hold that there is not at least a charge in the libel of misbranding. These allegations do charge that vinegar made from evaporated or dried apples is not the same thing as vinegar made from the fresh juice of apples, or cider, in the ordinary acceptation of the word. In substance this is a charge that there is substituted for apple cider vinegar made from cider, as that word is commonly

understood, another and a different product, or, at least, a product made by a process other and different from that which the ordinary purchaser would understand from this label was used. Upon this interpretation of the libel I feel myself bound to overrule the demurrer.

I can not well take judicial notice of the facts urged in support of the demurrer, as tending to show that there was no adulteration or misbranding. Defendant's contentions, I understand, are these: that apples are first selected, that they are then dried and evaporated, that the process used in drying and evaporating does nothing to the apples except to extract therefrom the water contained in the
14 apples and present in fresh cider; that in the drying, or evaporating process, sulphuric acid, or another chemical, is used in small quantities, but that later when these apples are to be used they are then put through some process; that this new process consists merely in restoring the water originally extracted; that cider of the same taste, kind and quality as fresh cider can, and is, then made from these apples, and that the amount of sulphuric acid, or other acid, is eliminated by precipitation. This, it is claimed, produces cider in the same sense as the word is understood when applied to the fresh juice of apples. It is further claimed that this cider has the same constituent qualities and is of the same taste as fresh apple juice and is, in fact, that product which the common man, has from time immemorial understood is meant by the word cider. It is further contended that this cider passes through the same process of fermentation, thereby producing alcohol, and through the further processes of chemical changes, whereby the alcohol is destroyed and converted into acetic acid, and that the resultant product is vinegar conforming with the Government's standards for vinegar, that is, therefore, apple cider vinegar in the same sense in which that phrase is understood and within the meaning of the label.

Whether if these facts were proved and this process disclosed these results the charge of adulteration or misbranding would still be sustained is the meritorious question which the parties desire the court to decide. If I had these facts before me in such a way as to make them a part of the record, I would be willing to decide it. I do not, however, feel at liberty upon this demurrer to assume these facts to be true and then express an opinion thereon. I would not thereby be deciding any question involved in the case. If, upon such an assumption of the facts I should sustain the demurrer, and the Government should then elect to stand upon its demurrer and prosecute error, the defendant would, in the Circuit Court of Appeals, be confronted, as I am confronted with the allegations of the libel, and if that court took the view that I take as to the meaning of the allegations of the libel, a reversal would result with no expression of opinion upon the question of merit. If, on the other hand, upon that assumed state of facts I should overrule the demurrer and the plaintiff should elect to stand thereon and a final judgment were rendered, then on error the parties would be confronted in the Circuit

Court of Appeals with the same difficulty. The defend-
15 ant would not, in that event, be able to get an expression of opinion in that court upon the merits. The fact is, that the question which the parties wish decided is now presented only in moot form.

For these reasons I am of the opinion that the demurrer should be overruled. It seems to me that the parties should have no difficulty in stipulating or agreeing upon these facts. If they are unwilling or unable to agree, then the best suggestion I can make, in order to get the question promptly decided, is that they file a stipulation in writing, waiving the right to a jury trial and consent that the testimony may be taken before a master. If this were done, no doubt I could find an open hour some day in the near future when the case could be presented and heard.

In taking testimony it does not seem to me that it would be helpful to bring in the testimony of jobbers and merchants to testify how they interpret, or understand, this label or brand. That kind of testimony seems to have been produced before Judge Geiger. I leave, however, counsel to determine the range of testimony if they should agree to have it taken before a master. If the case were heard before me, I am inclined to think I should sustain an objection to testimony of that kind.

The demurrer is overruled and an exception may be noted.

In United States District Court.

Order overruling demurrer.

Entered April 29, 1922, by D. C. Westenhaver, Judge.

This cause having been submitted to the court on a previous term of this court, on the demurrer of the Douglas Packing Company, on consideration thereof the court overruled said demurrer, to which ruling of the court the Douglas Packing Company, by its attorneys, excepts.

16 In United States District Court.

Agreed statement of facts.

Filed Aug. 22, 1922.

Libellant and claimant herein, desiring to submit this case to the court, upon the pleadings and an agreed statements of facts, hereby stipulate and agree that:

(1) Claimant, the Douglas Packing Company, is a New York corporation, with its principal office in the city of Rochester, New York, and with factories at Fairport and Canastota, New York. It is now and has been since January first, 1906, engaged in manu-

facturing food products from evaporated and unevaporated apples. From fresh apples it manufactures apple cider and apple cider vinegar, and from the evaporated apples it manufactures, by a process which is fully described in the section numbered (4) hereof products which it designates as "apple cider" and "apple cider vinegar." From the pulp of unevaporated apples and the pulp of the evaporated material it manufactures a product which it calls "Pectin."

(2) During the apple season, between about September 25th and December 15th, sound, mature, unevaporated apples are used by claimant, and for the balance of the year evaporated apples of like quality, including as large a portion thereof as claimant can manufacture in its own evaporating plants, located one in Vermont, one in Massachusetts, and one at Canastota, New York.

(3) With such apples as are evaporated by claimant the most approved process for dehydrating fruits is used. In dehydrating, small quantities of sulphur fumes are used to prevent rot, fermentation, and the consequent discoloration. The principal result of the dehydration process is the removal of about eighty per cent (80%) of the water. Whether and to what extent any other constituents of the apple are removed by the process of dehydration is not wholly beyond controversy; in the present state of chemical science no accepted test or method of analysis is provided, so far as the parties to this controversy are advised, for determining to what extent any constituents of the apple other than water are removed by the process of dehydration. Only mature, sound fruit, free from rot and fement, can be economically and advantageously used.

(4) In manufacturing from evaporated apples, claimant places in a receptacle a quantity of such evaporated apples to which
17 an amount of pure water substantially equivalent to that removed in the evaporating process has been added. A weight of more than one (1) ton is then placed on top of the apples and a stream of water, under a sufficient head, introduced through a pipe at the top of the receptacle, is applied until the liquid, released through a vent at the bottom of the receptacle, which vent opens as the stream of water is applied and closes as it ceases, has carried off in solution such of the constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar.

Such liquid, which is substantially equivalent in quantity to that which would have been obtained had unevaporated apples been used carries a small and entirely harmless quantity of sulphur dioxide, which is removed during the process of fining and filtration, by the addition of barium carbonate, or some other proper chemical agent, which by precipitation eliminates such sulphur compounds.

The liquid is then subjected to alcoholic and subsequent acetic fermentation in the same manner followed by the manufacturer of apple cider vinegar made from the liquid content of unevaporated apples.

Claimant employs the same receptacles, equipment, and process of manufacturing for evaporated as for unevaporated apples except that in the case of evaporated apples pure water is added as aforesaid, and in the process of fining and filtration an additional chemical agent is used to precipitate any sulphur compounds present and resulting from dehydration.

After fining and filtration, the resultant liquid obtained by claimant upon chemical analysis will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples, except that the liquid made from evaporated contains a trace of barium incident to the process of manufacture. There is no claim by the libellant that this trace of barium renders the product deleterious or injurious to health.

The vinegar made from the resultant liquid is similar in taste and in composition to the vinegar made from unevaporated apples, except that the vinegar made from evaporated apples contains a trace of barium incident to the process of manufacture. There is no claim by the libellant that this trace of barium renders the product deleterious or injurious to health.

It is conceded that the vinegar involved in this proceeding is vinegar made from dried or evaporated apples by substantially the foregoing process.

18 (5) There is no claim by libellant that the vinegar manufactured by claimant, and seized in the respective actions in this jurisdiction, is inferior to that made from unevaporated apples.

(6) Since January 1, 1906, until the commencement of this action, claimant has sold, throughout the United States, its product, manufactured from unevaporated as well as evaporated apples, as "apple cider" and "apple cider vinegar," selling its vinegar under the brand "Excelsior Brand apple cider vinegar made from selected apples," or "Sun Bright Brand apple cider vinegar made from selected apples." At the time of the commencement of this action claimant was so manufacturing and selling about 100,000 barrels of vinegar a year.

(7) Each of the parties hereto may submit such exhibits, properly labeled and identified, as they desire of the liquids from unevaporated apples and evaporated apples, including samples of the vinegar seized in this jurisdiction.

(8) It is not disputed or questioned in this case that the juice of unevaporated apples, when subjected to alcoholic and subsequent acetous fermentation, is entitled to the name "apple cider vinegar."

(9) For several years prior to the enactment of the Federal food and drugs act and subsequent thereto, vinegar in large quantities and to a certain extent a beverage, made from evaporated apples, were sold in various parts of the United States as "apple cider vinegar" and "apple cider," respectively, by many manufacturers, including the American Fruit Products Company, of which company

Robert Douglas, president of claimant company, had been production manager. The American Fruit Products Company operated eleven plants located in New England, New York, and Michigan.

(10) Since January 1, 1906, the claimant has manufactured such products and sold them labeled "Apple cider vinegar" and "Apple cider," respectively, and in doing so acted in good faith.

The United States Department of Agriculture has never sanctioned such labeling, and its attitude with reference thereto is evidenced by the definition of "apple cider vinegar" set forth in circulars 13, 17, 19, and 136 of the Office of the Secretary of the United States Department of Agriculture and Food Inspection Decision 140.

19 (11) From the report of the United States Census Bureau it appears that in 1910 there were 430 manufacturers of cider and vinegar, and the value of the product manufactured was $2,254,000.00, and from the report of the Census Bureau of 1920 there were 720 engaged in the manufacture of cider and vinegar, and the value of the product manufactured was $24,671,000.00.

GERARD J. PILLIOD,
Assistant United States Attorney.

United States Attorney, for Libellant.
WHITE, CANNON & SPIETH,
Attorneys for Claimant.

In United States District Court.

Answer.

Refiled Aug. 22, 1922.

(See page 8 of this record.)

In United States District Court.

Stipulation waiving trial to jury.

Filed Sept. 14, 1922.

The undersigned, libelant and claimant in this action, agree that a jury is waived on the trial of this cause and that the same shall be submitted to the court in lieu of a jury to find upon the issues of fact arising therein.

Dated, September 14th, 1922.

E. S. WERTZ,
U. S. Attorney.
WHITE, CANNON & SPIETH,
Attorneys for Claimant, The Douglas Packing Company.

20 In United States District Court.

Order directing that exhibit of claimant be placed in cold storage.

Entered Sept. 27, 1922, by D. C. Westenhaver, judge.

It appearing to the court that the claimant, the Douglas Packing Company, has filed herein an exhibit consisting of sample bottles of cider, sweet and fermented, and vinegar, under an agreed statement of facts, and that said sample, in order to be preserved in its present state, should be placed in cold storage until such time as it is to be used in the hearing of this case.

It is hereby ordered that such exhibit be placed in the cold storage department of the Sheriff Street Market, Cleveland, Ohio, the claimant herein, the Douglas Packing Company, to pay the storage and expenses incident thereto.

In United States District Court.

Opinion.

Filed Nov. 1, 1922.

WESTENHAVER, *District Judge:*

The Government has seized and libeled, and now seeks to condemn 95 barrels of vinegar shipped in interstate commerce, on the ground that this vinegar is adulterated and misbranded. The shipper, Douglas Packing Company, has appeared and claimed the vinegar, and makes defense. A jury trial has been waived in writing, and the case tried to the court on an agreed statement of facts.

None of the material facts is in dispute. The vinegar is labeled "Excelsior Brand apple cider vinegar made from selected apples reduced to four per centum. Guaranteed to comply with all pure food laws." This vinegar is not made from the expressed juice of fresh apples as pure cider vinegar is commonly understood to
21 be made, but is made from evaporated apples. Claimant, it is agreed, selects mature, sound fruit, free from rot and ferment, and dehydrates same by the most approved processes. In the process of dehydrating, small quantities of sulphur fumes are used to prevent rot and fermentation and subsequent discoloration. The principal result of dehydration is the removal of about eighty per cent of the water content of the apples. Whether in dehydration any other constituents of the apple are removed, is not beyond controversy, as in the present state of chemical science no accepted test or method of analysis is known to the parties for determining that problem. In manufacturing vinegar from apples thus evaporated, claimant places in a suitable receptacle a given quantity of evaporated apples, to which is then added an amount of pure water substantially equal to the amount previously removed by evaporation.

Pressure is applied at the top of this mass, and a stream of water under sufficient head is introduced at the top through a pipe and is applied until the liquid released through a vent at the bottom has carried off in solution such constituents of the evaporated apples as are soluble in cold water and useful in the manufacture of vinegar. The liquid product thus obtained, it is agreed, is substantially equal in quantity to that which would have been obtained had fresh apples been used. This liquid carries a small and entirely harmless quantity of sulphur dioxide, which is removed later in the process of fining and filtration by the addition of barium carbonate or some other proper chemical agent which by precipitation eliminates the sulphur compound. The liquid, after this treatment, gives, upon chemical analysis, results similar to those obtained by the chemical analysis of apple cider made from fresh apples, except that it contains a trace of barium. No claim is made that this trace of barium renders the product deleterious or injurious to health. The subsequent process of alcoholic and acetic fermentation is the same as that commonly followed in making vinegar from the expressed juice of fresh apples. The vinegar thus made is similar in taste and composition to the vinegar made in the usual way from fresh apples, except that it contains a trace of barium. No claim is made that this trace of barium renders the product deleterious or injurious to health. Claimant uses in making vinegar in this way, the same receptacles, equipment, and process as is used in making cider and vinegar from unevaporated apples. It has been making and
22 selling apple cider and apple cider vinegar thus produced, continuously from a period antedating January 1, 1906. Other cider and vinegar makers have been doing the same. The total amount thus produced and sold has been and is very large. The United States Department of Agriculture has, however, never sanctioned such labeling and its attitude with respect thereto is evidenced by circulars 13, 17, 19, and 136, and Food Inspection Decision 140. Exhibit samples of cider fermented and unfermented made from fresh and evaporated apples, and vinegar made from both kinds of cider, have been submitted and were personally examined by me. There are slight differences in appearance and taste, but all have the appearance and taste of cider and vinegar. The foregoing are all the facts material to the determination of this controversy.

The Government claims that the vinegar in question thus manufactured is adulterated, in that there is substituted for genuine apple cider vinegar a manufactured product from evaporated apples, in violation of par. 1 and 2, sec. 7, food and drug act, June 30, 1906; also that it is misbranded, in that the statements on the label, "Apple cider vinegar made from selected apples and guaranteed to comply with all pure food laws," are false and misleading, in violation of general paragraph, sec. 8, and par. 2 and 4, sec. 8 of said act; and also that it is misbranded, in that it is labeled in imitation

of and offered for sale under the distinctive name of another article, to wit, apple cider vinegar, in violation of par. 1, sec. 8 of said act. Claimant vigorously and earnestly disputes each and all of these contentions.

This case has received the careful consideration which the magnitude of the interests and the importance of the question involved have demanded. My conclusion is in accord with the unreported decision of Judge Geiger of the Eastern District of Wisconsin. In my opinion, this vinegar is misbranded, if not adulterated, within the meaning of said act.

Vinegar is a food product, as defined in sec 6 (U. S. Comp. Stat. 1916, sec. 8722) of said act. It is probably not adulterated within the meaning of par. 1, sec. 7. Whether it is adulterated within the meaning of par. 2, sec. 7, will not be determined by me. The question of whether it is adulterated within the meaning of that paragraph turns on whether or not vinegar manufactured by the process above described is a substitution in whole or in part of one
23 article for another; that is, a spurious vinegar for apple cider vinegar. Claimant's contention is that apple cider made by expressing the juice of fresh apples, and its liquid product produced as above described, from evaporated apples, are both apple cider, and that the difference resolves itself merely to a controversy over the process by which apple cider and apple cider vinegar are made. However, as I am content to dispose of this case upon the question of misbranding alone, no opinion need or should be expressed upon this aspect of the controversy.

The applicable provisions of the food & drug act with respect to misbranding, are sec. 8, general paragraph, and paragraphs 1 and 2 and 4 of sec. 8. The general paragraph of sec. 8 provides: "The term 'misbranded' as used herein shall apply to all * * * articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances therein contained which shall be false or misleading in any particular." Thus is appears that the false or misleading statement which is forbidden applies as much to the food article as to the ingredients or substances of which it is made: hence any statement regarding the article which is false or misleading, is within the definition of "misbranding." Par. 2 provides that in case of foods an article shall be deemed to be misbranded "if it be labeled or branded so as to deceive or mislead the purchaser." Par. 4 says it shall be deemed to be misbranded "if the package containing it, or its labels, shall bear any statement, design, or device regarding the ingredients or the substance contained therein, which statement, design, or device shall be false or misleading in any particular." In this paragraph the false or misleading statement applies only to the ingredients or substance of the article, but the language used emphasizes that the object of the law was to prevent the purchasing public from being misled or deceived in the sale and distribution of food products. Par. 1 says

an article shall be deemed to be misbranded "if it be an imitation of or offered for sale under the distinctive name of another article." The general purpose, as well as the explicit prohibitions of the law, is to be determined from these statutory provisions.

These provisions have been often considered by the courts. The food & drug act, although penal in its nature, is not given a strict construction, but one which will reasonably tend to accom-
24 plish its general object and purposes. U. S. vs. Antikamnia Co., 231 U. S. 654, 665, 666; Frank vs. U. S. (6 C. C. A.) 192 Fed. 866, 869–70. All the words and terms used therein should be given their proper and usual signification and effect. U. S. vs. Lexington Mill Co., 232 U. S. 399, 409–10. The courts take judicial notice of the usual meaning and definition of familiar words. Nix vs. Hedden, 149 U. S. 304. As regards misbranding, Mr. Justice Day, in U. S. vs. Lexington Mill Co., supra, says: "The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality." In U. S. vs. Antikamnia Co., supra, 231 U. S. 654, Mr. Justice McKenna, at p. 665, says: "The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it." Numerous Circuit Court of Appeals and District Court cases have been decided, declaring the same rules and emphasizing more particularly that the prohibition of misbranding is designed to prevent deceiving or misleading the purchasing public, even though the article sold is in itself equally good or not injurious to health. See Brina vs. U. S. (2 C. C. A.), 179 Fed. 373; Frank vs. U. S. (6 C. C. A.), 192 Fed. 866, 869–70; U. S. vs. Tepee Apples (D. C.), 179 Fed. 985; U. S. vs. Scanlon (D. C.), 180 Fed. 485; U. S. vs. 10 Barrels of Vinegar (D. C.), 186 Fed. 399; U. S. vs. 100 Barrels of Vinegar (D. C.), 188 Fed. 471. The decisions of State courts under pure food laws of similar character, are to the same effect. See People vs. Girard, 145 N. Y. 105; People vs. Niagara Fruit Co., 77 N. Y. S. 805, affirmed, 173 N. Y. 629; People vs. Douglas Packing Co., 194 N. Y. S. 633. Such, in brief outline, are the rules of law applicable to this controversy.

Claimant's label does, in my opinion, tend to mislead and deceive the ordinary purchaser and user of vinegar. Cider is defined by Webster as "the expressed juice of apples." By the word "expressed" is meant expelled or forced out. From time immemorial apple cider has been understood to mean the expressed juice of fresh apples and not of dried apples. Apple vinegar or apple cider vinegar likewise in the popular mind has from time immemorial been understood as meaning vinegar produced from apple cider thus defined. Claimant's label conveys the impression that this
25 vinegar is made from that kind of apple cider and that this apple cider is made in the common and familiar way from

fresh or undried apples. The mere fact that the words "apple cider" and "selected apples" are brought together in the same label, conveys unmistakably this impression and repels any other or different impression. Apple cider is a well-known product. Apples are a well-known fruit. Cider means nothing else to the ordinary mind than the expressed juice of fresh and undried apples. Apples mean nothing else to the ordinary mind than fresh and unevaporated apples. A merchant who advertises and offers apples for sale could not compel a purchaser to accept dried or evaporated apples. The latter are not apples as that word is understood in the trade or by a person of ordinary intelligence, but are a manufactured product, an entirely different article. Nor, in my opinion, could a merchant who offers apple cider for sale, compel a purchaser to accept a liquid made from evaporated apples in the manner above described, even though it does possess substantially the same chemical constituents and has substantially the same taste as the expressed juice of fresh apples. Claimant's label consequently misleads and deceives. It makes a statement with respect to an article of food which conveys the false notion that this article is vinegar made from the expressed juice of fresh apples.

Claimant earnestly contends that its product is vinegar because it conforms to the chemical tests prescribed for vinegar by circulars of the United States Department of Agriculture, No. 13, 17, 19, and 136. It also contends that it is made from apple cider because apple cider is only the juice of apples, and that its process first merely extracts the surplus water, and later restores it, and hence the resulting liquid obtained by pressure is apple juice or apple cider, even if it is not the expressed juice of fresh apples. This being so, it further contends that the board of food & drug inspection provided by the pure food & drug act, have no power under the law to declare, as it did, by Food Inspection Decision 140, that vinegar made from dried or evaporated apples is not entitled to be called vinegar without further designation. It may be admitted that this board has no power to add to or to take from the law. It does not, however, follow that claimant's label is true and does not tend to mislead or deceive, or that what the Government is complaining of is not misbranding but a process of making apple cider and apple cider vinegar. Claimant's argument overlooks certain mate-
26 rial and controlling considerations. One is that apple cider as defined in the dictionaries and as commonly and popularly understood, is the expressed juice of fresh apples, and that apple vinegar is commonly and popularly understood to be produced by the alcoholic and acetic fermentation of that kind of cider. Another is that the law was designed to prevent the ordinary purchaser from being deceived and misled as to what he is buying, and that therefore the test of misbranding is the effect of the label or statement upon the ordinary purchaser. A statement that an article is apple cider vinegar made from selected apples can convey no other idea

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to such a person in the present state of common knowledge than that the vinegar is made from the expressed juice of fresh apples and not by the manipulation of dried or evaporated apples. If it does, and the ordinary purchaser is or may be thereby misled or deceived, it is no answer to say that he gets a vinegar which is equally good. The object of the law is to let the purchaser know just what he is buying and to let him decide whether he wants it or not. One may not take advantage of his prejudices or want of information to sell him something different from what he thinks he is buying.

Several authorities have been cited which, while involving facts somewhat different, tend to support my conclusion. Claimant's label was under consideration recently in People vs. Douglas Packing Co., 194 N. Y. S. 633. The decision was upon demurrer and is not a final adjudication of any point in controversy, but the reasoning of the opinion impresses me as sound. The New York statute defines cider vinegar and apple vinegar as a product made exclusively from the pressed juice of apples, by alcoholic and subsequent acetic fermentation. These terms, it is said, should be taken in their ordinary and familiar meaning. It is further said: "The statutory definition of 'cider vinegar' and 'apple vinegar' means by this test vinegar made from apple cider. Even if those terms had been undefined in the statute, they nevertheless would have had in the popular mind a well-defined meaning, in that apple cider is known in every household, and cider vinegar is known to be made from it, though the chemical processes by which the one becomes the other are generally unknown. Other vinegars may be perfectly harmless, chemically undistinguishable, it may be, but calculated to deceive, if marketed under a false label. The popular notion of cider vinegar and
27 the ordinary and obvious meaning attached to the words, exclude the notion of making this common article of domestic use from cider pressed from dried apples. The statute is designed to enable consumers to get what they believe they are getting under the labels 'cider vinegar' and 'apple vinegar'." In U. S. vs. 100 Cases of Tepee Apples, McPherson, District Judge, held that canned Arkansas apples and blackberries were misbranded because the label on the cans gave Michigan cities as the place of manufacture, thereby conveying the misleading impression that the apples and blackberries were Michigan fruit. It was contended that Michigan apples and blackberries were superior in quality to the Arkansas fruit, but this consideration was disregarded as immaterial, Judge McPherson saying: "The other purpose (of the law) was to enable a purchaser to obtain what he called for and was willing to pay for. And under this latter view, it is immaterial whether Michigan fruits are better than those grown in Arkansas. A purchaser of canned goods may prefer Michigan fruits. He may believe them to be better than Arkansas fruits. He has the right to call for them, and when he pays or is debited for them, he has the right to have Michigan fruits. The purchaser has the right to determine for himself which he will

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buy and which he will receive and which he will eat. The vendor cannot determine that for the purchaser. He, of course, can make his arguments, but they should be fair and honest arguments." In Brina vs. U. S. (2 C. C. A.) 179 Fed. 373, cottonseed oil was labeled in large Italian letters "oil for salad" and in small English letters "cotton salad oil extra quality"; and this was held to be misbranded. The trial judge, without evidence, charged the jury that "as a notorious fact salad oil prima facie means olive oil" and that misbranding resulted, unless evidence were produced to show a different meaning in the trade. This ruling was assigned as error. In the opinion of the Circuit Court of Appeals it is pointed out that salad oil is defined as olive oil in Worcester's, Stormont's Imperial, Encyclopedia, and Century Dictionaries, and that no error was committed in thus charging. Compare U. S. vs. 10 Barrels of Vinegar (D. C.) 186 Fed. 399; U. S. vs. Scanlon, 180 Fed. 485; Frank vs. U. S. (6 C. C. A.) 192 Fed. 866, 869–70.

Upon authority, as well as upon principle, it must be held
28 that the charge of misbranding is sustained. The label does bear statements regarding the article and the ingredients or substance thereof which are false and misleading, and the vinegar must be held to be offered for sale under the distinctive name of another article as that name is popularly and commonly understood. Judgment of forfeiture and condemnation will be entered.

D. C. WESTENHAVER,
Judge.

November 1, 1922.

In United States District Court.

Journal entry of judgment.

Entered Nov. 13, 1922, by D. C. Westenhaver, Judge.

The parties, by their attorneys come, a jury trial having been waived in writing, and submit this cause to the court on the pleadings and an agreed statement of facts, which facts are hereby found by the court to be the facts of this case; on consideration whereof, the court, being fully and duly advised in the premises, finds on the issues joined that the ninety-five barrels, more or less, of vinegar seized herein were shipped in interstate commerce by claimant, Douglas Packing Company, from Fairport, New York, to Fisher Brothers, Cleveland, in the State of Ohio, Northern District of Ohio, Eastern Division, via the New York Central Railroad Company, a common carrier engaged in carrying freight from one State of the United States to another State of the United States, particularly from said Fairport, New York, to said Cleveland, Ohio; that said ninety-five barrels of vinegar, more or less, were seized while in the possession of said Fisher Brothers, at Cleveland,

in the said State and district, as aforesaid, and within the jurisdiction of the United States and of this court.

29 The court further finds that all of the allegations of the libel respecting charges of misbranding are true and correct and that said ninety-five barrels of vinegar, more or less, seized are misbranded, contrary to and in violation of general paragraph of section eight and paragraphs first, second, and fourth of section eight of the provisions of the act of Congress approved June 30, 1906, commonly known and designated as the food and drugs act, as charged and set forth in said libel.

The court further finds that the allegations of said libel respecting the charge of adulteration, within the meaning of paragraph first, under food, of section seven of said food and drugs act, is unsupported. The charge in respect to adulteration, in violation of paragraph second, under food, of section seven of said act, no finding is made.

Therefore, it is ordered, adjudged, and decreed that said ninety-five barrels of vinegar, more or less, with their contents, be and the same are hereby, declared to be misbranded, in violation of general paragraph of section eight and paragraphs first, second, and fourth of section eight of the provisions of the act of Congress approved June 30, 1906, commonly known and designated as the food and drugs act, as charged and set forth in said libel.

And it is further ordered, adjudged, and decreed that said ninety-five barrels of vinegar, more or less, labeled and branded as in said libel set forth, be and the same are hereby condemned and forfeited as prayed for in said libel and as provided for in said act of Congress, and the United States marshal for the Northern District of Ohio is hereby ordered and directed to sell, within twenty (20) days of the date hereof, the said ninety-five barrels of vinegar, more or less, under such terms and conditions as are not in violation of said food and drugs act; provided, however, that in the event of the United States marshal being unable to dispose of said vinegar by sale, as herein provided, then the said marshal is hereby ordered and directed to dispose of said vinegar by destruction, under such terms and conditions as are provided and approved in said act.

And it is further ordered that if said vinegar be disposed of, as herein provided, then the proceeds thereof shall be deposited and disposed of as provided by said food and drugs act.

30 It appearing to the court, however, that said ninety-five barrels of vinegar, more or less, may be relabeled in such manner as to render the shipment thereof not in violation of the said food and drugs act or contrary to the laws of any State, Territory, or insular possession.

It is, therefore, further ordered, adjudged, and decreed that, upon the payment of the costs of the libel proceedings herein and upon the execution and delivery to libelant by claimant, Douglas Packing

Company, of a good and sufficient bond in the sum of one thousand dollars ($1,000.00), conditioned that said ninety-five barrels of vinegar, more or less, labeled and branded as aforesaid in said libel, shall not be sold or otherwise disposed of, contrary to the provisions of said act or to the laws of any State, Territory, or insular possession, the marshal shall redeliver and surrender the ninety-five barrels of said vinegar, more or less, so labeled and branded as set forth in said libel, to said Douglas Packing Company, in lieu of disposing thereof by sale as aforesaid.

Claimant, Douglas Packing Company, excepts to such finding, judgment, and order of forfeiture and condemnation.

The motion by claimant, Douglas Packing Company, to set aside the finding, judgment, and order of forfeiture and condemnation and for a new trial is heard and refused, to which ruling claimant, Douglas Packing Company, excepts.

In United States District Court.

Motion by claimant, Douglas Packing Company, for a new trial.

Filed Nov. 13, 1922.

Now comes the claimant, Douglas Packing Company, by White, Cannon, and Spieth, its attorneys, and moves the court to set aside the finding, judgment, and order of forfeiture and condemnation entered herein, and for a new trial, and for cause of said motion, says:

31 (1) That the finding of the court, judgment, and order entered herein is not sustained by the evidence.

(2) That the finding of the court, judgment, and order entered herein is contrary to law.

(3) That the finding of the court, judgment, and order entered is in favor of libelant, when it should have been in favor of claimant.

WHITE, CANNON & SPIETH,
Attorneys for Douglas Packing Company, Claimant.

In United States District Court.

Order withdrawing claimant's exhibit.

Entered Nov. 13, 1922, by Judge Westenhaver.

It being represented to the court that claimant's, Douglas Packing Company, exhibit, consisting of sample bottles of cider, sweet and fermented, and vinegar, filed in this cause cannot be conveniently duplicated, it is ordered by the court that said exhibit be withdrawn from the files of this court and forwarded to the clerk of the United States Circuit Court of Appeals for the Sixth Circuit, with the transcript of record in this cause, for use at the hearing of this cause in said Circuit Court of Appeals.

In United States District Court.

Petition for writ of error.

Filed Nov. 13, 1922.

Now comes Douglas Packing Company, claimant herein, by its attorneys, White, Cannon and Spieth, and says that on or about the 13th day of November, 1922, this court entered a finding, judgment, and order of forfeiture and condemnation herein in favor of
32 the libelant and against the defendant, ninety-five barrels, more or less, alleged apple cider vinegar, and claimant, Douglas Packing Company, in which finding, judgment, order of forfeiture and condemnation, and the proceedings had thereto in this cause, certain errors were committed to the prejudice of said defendant and this claimant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this claimant prays that writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Sixth Circuit for the correction of errors so complained of and for such other and further relief in the premises as may be just, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

WHITE, CANNON & SPIETH,
Attorneys for Claimant, Douglas Packing Company.

In United States District Court.

Assignment of errors.

Filed Nov. 13, 1922.

Now comes the Douglas Packing Company, claimant in this action, and in connection with its petition for a writ of error, assigns the following errors in the trial and finding, judgment, and order of forfeiture and condemnation of said District Court in said cause, as follows:

(1) Said court erred in that the finding, judgment, and order of forfeiture and condemnation of the court entered herein is not sustained by the evidence.

33 (2) Said court erred in that the finding, judgment, and order of forfeiture and condemnation of the court entered herein is contrary to law.

(3) Said court erred in that the finding, judgment, and order of forfeiture and condemnation was entered against claimant, whereas the finding and judgment ought to have been rendered in favor of claimant and against the libelant.

(4) Said court erred in overruling claimant's motion to set aside the finding, judgment, and order of forfeiture and condemnation, and for a new trial.

(5) For other errors manifest and apparent upon the record.

Wherefore, claimant prays that said finding, judgment, and order of forfeiture and condemnation may be reversed.

WHITE, CANNON & SPIETH,
Attorneys for Claimant, Douglas Packing Company.

In United States District Court.

Order allowing writ of error.

Entered Nov. 13, 1922, by D. C. Westenhaver, Judge.

This 13th day of November, 1922, came the claimant, Douglas Packing Company, by its attorneys, and filed herein and presented to the court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings, and papers upon which the finding, judgment, and order of forfeiture and condemnation herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the claimant giving bond, according to law, in the sum of five hundred dollars ($500.00), which shall operate as a supersedeas bond.

34 *Bond on writ of error or appeal for $500.*

Approved and filed Nov. 13, 1922.

[Omitted in printing.]

35 In United States District Court.

Writ of error.

Filed Nov. 13, 1922.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States, to the honorable the Judge of the District Court of the United States for the Northern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before

you, or some of you, between the United States of America, plaintiff, against Ninety-five barrels, more or less, alleged apple cider vinegar, defendant, and Douglas Packing Company, claimant, a manifest error hath happened, to the great damage of the said Douglas Packing Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the * 13th day of December next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

36 Witness the Honorable William Howard Taft, Chief Justice of the United States, the 13th day of November, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the United States of America the one hundred and forty-seventh.

[SEAL.]

B. C. MILLER,
Clerk of the District Court of the United States for the Northern District of Ohio.
By M. E. BAUMAN,
Deputy Clerk.

Allowed by
D. C. WESTENHAVER,
Judge of the District Court.

37–38 *Citation in usual form showing service on Gerard J. Pilliod.*

[Omitted in printing.]

39 In United States District Court.

Stipulation re certification of record.

Filed Nov. 13, 1922.

In accordance with section 7 of rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer, may be certified by the clerk as required by law and the rules of the appellate court, as a true, full, and complete copy of the original pleadings, papers, and orders used on the trial of this

* Not exceeding 30 days from the day of signing the citation.

cause, as set forth in the precipe for transcript, without further comparison by the clerk.

GERARD J. PILLIOD,
Asst. U. S. Atty.,
Attorney for Libelant.
WHITE, CANNON & SPIETH,
Attorneys for Claimant.

40 In United States District Court.

Precipe for transcript.

Filed Nov. 13, 1922.

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above-entitled cause, and include therein the following papers and orders:

Title page.
Caption.
Libel.
Claim of Douglas Packing Co.
Answer of Douglas Packing Co.
Application to withdraw answer.
Order granting motion to withdraw answer.
Demurrer.
Opinion of court on demurrer.
Order overruling demurrer.
Agreed statement of facts.
Answer refiled.
Stipulation waiving trial to jury.
Order directing that exhibit of claimant be placed in cold storage.
Opinion.
Journal entry.
Motion for a new trial.
Order withdrawing claimant's exhibit.
Petition for writ of error.
Assignment of errors.
Order allowing writ of error.
Bond on appeal.
Writ of error.
Citation.
Stipulation as to printing record.
Precipe for transcript.
Clerk's certificate.

And deliver all papers to the Gates Legal Publishing Company for printing.

WHITE, CANNON & SPIETH,
Attorneys for Claimant, Douglas Packing Co.

41 In United States District Court.

Certificate of clerk.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, clerk of the District Court of the United States for said district, do hereby certify that the annexed and foregoing pages contain a full, true, and complete copy of the final record, including the petition for writ of error, assignment of errors and bond on writ of error, and all proceedings in said cause, in accordance with the praecipe for transcript filed by plaintiff in error, the originals of which, except a certain exhibit withdrawn by leave of court, are now in my custody as clerk of said court.

There is also annexed to and transmitted with such transcript of record the writ of error and the citation issued and allowed in this case.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said district, this 16th day of November, A. D. 1922, and in the 147th year of the Independence of the United States of America.

B. C. MILLER,
Clerk.

[SEAL.] By M. E. BAUMAN,
Deputy Clerk.

42 Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

Motion to advance cause.

Filed Nov. 17, 1922.

Now comes plaintiff in error, by White, Cannon and Spieth, its attorneys, and moves the court for an order to advance the within case for hearing in January, and for cause thereof says:

The question involved arises under the pure food and drugs act, and relates to the labeling of vinegar made from evaporated and unevaporated applies.

In the District Court of the United States for the Northern District of Ohio, Eastern Division, there are ten pending cases; in the District Court at Columbus and Cincinnati there are several similar cases; and in various other District Courts of the United States there are about fifty cases, all involving the same question, which are dependent upon the final determination of the within case.

43 Plaintiff in error is one of the largest manufacturers of vinegar in the United States, and until the present controversy in regard to the labeling of vinegar is settled it is very seriously handicapped in the manufacture and distribution of its product. Other manufacturers are in the same situation. The dis-

tributors of vinegar and the purchasing public are also much interested in having this question of labeling finally determined.

The question involved is, therefore, of general interest and an early hearing of this case will not only assist in disposing of a large number of pending cases, but will also be of great benefit and relieve an uncertainty which now exists in the vinegar trade.

WHITE, CANNON & SPIETH,
Attorneys for Plaintiff in Error.

Consent is hereby given for the granting of the above motion.

GERARD J. PILLIOD,
Asst. United States District Attorney for Defendant in Error.

November 16th, 1922.

44 United States Circuit Court of Appeals for the 6th Circuit.

Order advancing cause for hearing.

Filed Nov. 17th, 1922.

This cause is advanced and assigned for hearing at the January session, 1923.

United States Circuit Court of Appeals for the 6th Circuit.

Appearance of counsel.

Filed Nov. 20, 1922.

ARTHUR B. MUSSMAN,
Clerk of said court:

Please enter my appearance as counsel for the plaintiff in error.

WHITE, CANNON & SPIETH.

United States Circuit Court of Appeals for the 6th Circuit.

Order continuing cause.

Filed Jan. 8th, 1923.

This cause is continued until the February session pursuant to stipulation of counsel.

45 United States Circuit Court of Appeals for the 6th Circuit.

Order granting leave to file amicus curiae.

On application of Mr. Judson Harmon leave is granted to file brief as amicus curiae.

United States Circuit Court of Appeals for the 6th Circuit.

Cause argued and submitted.

February 6th, 1923—before Knappe, Denison, and Donahue, JJ.

This cause is argued by Mr. L. C. Spieth on behalf of the plaintiff in error and is submitted on brief on behalf of the defendant in error.

United States Circuit Court of Appeals for the 6th Circuit.

Judgment.

Filed April 3, 1923.

Error to the District Court of the United States for the Northern District of Ohio. This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

46 On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings in accordance with the opinion of this court. In accordance with paragraph 2 of rule 27, no costs are allowed.

United States Circuit Court of Appeals for the 6th Circuit.

Opinion.

Filed April 3, 1923.

47 [Title omitted.]

DONAHUE, *Circuit Judge:*

The United States filed a libel in the District Court for the seizure and condemnation of ninety-five barrels of alleged apple cider vinegar, labeled "Excelsior Brand apple cider vinegar made from selected apples," charging that this vinegar is both adulterated and misbranded in violation of the food and drugs act of June 30, 1906. The Douglas Packing Company, the manufacturer and owner of this vinegar, intervened and denied that it was either adulterated or misbranded and asked restitution.

A written waiver of trial by jury was filed and the case was submitted to the court upon an agreed statement of facts. The

48 trial court found that the vinegar was not adulterated, but was misbranded in violation of general paragraph of section 8 and subparagraphs 1, 2, and 4 as to foods of section 8 of the

food and drugs act of June 30, 1906, as charged in said libel and ordered its condemnation and forfeiture as provided by that act.

It appears from the agreed statement of fact that claimant, the Douglas Packing Company, is engaged in the manufacture of apple cider and apple cider vinegar; that during the apple season, from about September 25th to December 15th of each year, sound, mature, unevaporated apples are used by it in the manufacture of its products, and for the balance of the year evaporated apples of like quality are used.

The principal result of the evaporation process is the removal of 80% of the water contained in the natural fruit. While it is not admitted that there are no other constitutents of the apple removed by this process, yet it is admitted, in effect, that if any other constituents are removed by evaporation, the amount thereof is so negligible that the science of chemistry is unable to determine that fact. When the apple season is over and the evaporated apples are used by the claimant, in the manufacture of its products, substantially the same amount of pure water is added to the evaporated apples that was removed by the evaporating process. In all other respects the claimant employs the same receptacles, equipment, and process as in the manufacture from the unevaporated apple.

In the evaporating process small quantities of sulphur fumes are used to prevent rot, fermentation, and decomposition. This is wholly removed therefrom by the addition of barium carbonate, or some other chemical that eliminates itself and the sulphur compound by precipitation. After fining (clarifying) and filtration the cider or liquid obtained from the evaporated apple, upon chemical analysis, will give results similar to those obtained by chemical analysis of apple cider made from unevaporated apples, except a trace of barium—in other words, an amount too small to be quantitively measured. No claim is made that this trace of barium renders the product injurious or deleterious to health, and, except for this trace of barium, the vinegar made from this cider or liquid obtained from the evaporated apple is similar in taste and composition to the vinegar made from the cider of the unevaporated apples.

49 It was evidently the purpose and intent of the Government and the claimant, in subscribing to the agreed statement of facts, to eliminate from consideration all unimportant matters and confine the issues to important basic questions affecting the substantial rights of the parties. These issues must be determined solely upon consideration of the facts admitted, regardless of the possibility that facts might have been established by evidence, at variance therewith and more in harmony with a supposed public opinion upon this subject.

The libel charges that this vinegar is adulterated in violation of paragraphs 1 and 2, under food, of section 7 the food and drug act of June 30, 1906, which paragraphs read as follows:

"1. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength."

"2. If any substance has been substituted wholly or in part for the article."

It is clear that this trace of barium, which is admitted to be neither injurious or deleterious, does not constitute adulteration within the meaning of either of the paragraphs of section 7 of the food and drug act above quoted. U. S. v. Lexington Mill and Elevator Co., 232 U. S. 399.

The question whether some other substance has been substituted wholly or in part for the article known as "apple cider vinegar" in violation of the second paragraph of this section will be considered and discussed in connection with the charge of misbranding.

It is insisted, however, upon the part of the Government that the barrels are also labeled "Guaranteed to comply with all pure food laws"; that this means not only the Federal food and drug act, but also the pure food laws of the State where this vinegar is intended to be sold at retail, after it passes beyond the jurisdiction of the Federal authorities. The libel, however, is based solely upon the adulteration and misbranding of this vinegar in violation of the Federal food and drug act. While it is alleged that the vinegar was shipped from Fairport, N. Y., to Fisher Brothers, Cleveland, Ohio, there is no allegation that the vinegar is to be sold in the State of Ohio or that it is adulterated or misbranded in violation of the Ohio Statutes, nor is there anything in the agreed statement
50 of facts in reference to its final destination and place of sale at retail.

If, however, it were conceded that this libel could be construed as charging that this vinegar is adulterated or misbranded in violation of the terms and provisions of the Ohio law, the same result must follow. Substantially the same questions are presented under the Ohio Statute (sec. 5789, G. C.) in reference to misbranding, as are presented under the Federal food and drug act, which questions will be discussed later in this opinion. Upon the question of adulteration under the Ohio law, no claim is made that this vinegar contains less than 4% by weight of absolute acetic acid, nor is a mere trace of barium, which is neither deleterious or injurious to health, a "foreign substance" within the contemplation, intent or purpose of sec. 5786 of the General Code of Ohio. U. S. v. Lexington Mill and Elevator Co., supra.

Section 8 of the food and drug act provides, among other things, that, in a case of foods, an article shall be deemed to be misbranded if it be labeled or branded so as to deceive or mislead the purchaser, or it be an imitation of, or offered for sale under the distinctive name of another article.

The important question in each case is whether the product is the identical thing that its brand indicates. If it is the identical thing indicated by the brand, the method of its manufacture, regardless of the information of the general public upon that subject, is wholly unimportant.

It appears from the agreed statement of facts that the cider from which this vingear was made, was manufactured from apples and from nothing else. The process of its manufacture differed from the usual method only in so far as necessary to preserve the fruit. This was accomplished by the evaporation process above described. When a quantity of water equal to the amount evaporated is added to the evaporated apples and pressed therefrom it combines with and carries the solvent properties of the apples just the same as in the original state, or if not exactly and identically the same, so near as to defy the science of chemistry to discover the difference. This is the full scope and effect of the dehydrating process as appears by the agreed statement of fact.

The conservation of our food products is of some concern to the public and, perhaps, second in importance only to the demand
51 for pure and unadulterated food. It is perfectly apparent that the apple season is altogether too short for the economical manufacturing of the crop, during the season, into cider vinegar in sufficient quantities for public consumption. Therefore an efficient and harmless method of preserving the fruit until it can be used for this purpose is in the direct interest of the public, and if this method has accomplished that object without change in the product, it should be encouraged rather than condemned.

If, after cider has been pressed from unevaporated apples, a large amount of the water that is a constituent part thereof, is evaporated therefrom and later an equal amount of water is added thereto, the constituent elements of cider yet remains and it would hardly be contended that vinegar made therefrom would not be apple cider vinegar, yet so far as the agreed statement of facts discloses, there is substantially no difference between the evaporation of water from the cider and evaporating the water from the apple before the cider is pressed therefrom. The water is not all evaporated, leaving only a hard dried fruit, as may approximately result from sun drying; 20% of the water remains and this continues to be the condensed juice of the fruit ready for restoration by pure water dilution to its original volume. This was the underlying idea of the Allen patent, No. 268,972, for a dry mince pie compound, in which it appears that the water was evaporated from the apple for the purpose, as stated by the patentee, " so that I have the cider in my compound without useless water, which may be added when the consumer wishes to use it." Dougherty v. Doyle, 63 Fed. 475.

It must also be assumed that legislation upon any subject has some definite and substantial object in view, and is not in furtherance of technical purposes or barren idealities. It was declared by the Supreme Court in U. S. v. Lexington Mill and Elevator Co., 232 U. S. 399, that the primary purpose of Congress in enacting the food and drug act of 1906 was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food. That case involved the manufacture of flour by a new process, called the "Alsop process," and while the charge

there was adulteration, by adding to articles of food consumption, poisonous and deleterious substances, a much more serious matter than misbranding, yet the court held that in order to condemn
52 a food product upon the ground that it is adulterated it is incumbent upon the Government to establish the fact that the added substances may render the article injurious to health. This conclusion was reached evidently upon the theory that the legislative intent was to accomplish a substantial and beneficial result to the public and not merely for the purpose of exercising an arbitrary control over private business.

It is undoubtedly true that vinegar not made from apple cider, even though chemically equal to cider vinegar, may not be branded as such. On the other hand, vinegar made from apple cider is not misbranded by reason of its failure to meet the chemical test.

Misbranding is included in the statutory prohibition because it bears some relation to the conservation of the public health and not primarily because a purchaser's whims were to be protected: and, though doubtless the test of misbranding a product is whether it is true to name, there is no occasion for overstrictness in applying this test in a case where the public health can not possibly be jeopardized.

In the Standard Encyclopedia, under the caption, "Cider," it is said, "Apples commonly used for making cider are by no means tempting to the palate and are, in fact, unfit for eating raw or ordinary cooking. * * * In the United States it is considered that a certain proportion of decay in fruit improves the flavor." Keeping in mind the underlying purpose to protect the public health and the admissions in this case that the present article is made wholly from "sound and mature apples, free from rot and ferment," it is clear that condemnation should not be made unless the statute imperatively requires it.

Definitions of cider, which include the method or process of its manufacture, written long before public needs required the conservation of our food products, are not helpful to the determination of the question presented in the instant case. Even these definitions call only for the juice of apples, and do not literally exclude the pressing of apples dehydrated and later hydrated in equivalent proportions. The missing and essential element for the Government's case is found only in the supposed judicial knowledge that the popular definitions have reference only to fresh apples. Such knowledge was declared in the court below, and the judgment based thereon. The danger of reliance on judicial knowledge founded on past impressions is well illustrated by the salad oil cases. The very
53 branding which the court, in Brina v. U. S., 179 Fed. 373, said it judicially knew was so untrue as to compel the conclusion of misbranding, two years later, was shown to the same court in Von Bremen v. U. S., 192 Fed. 904, to be so true as to require an instructed verdict for the respondent. In the present case it is conceded that this identical product has been sold and accepted by the trade under this name in great quantities for many years and with-

out challenge until now. While there is nothing in the agreed statement of facts to show how far this acceptance has been with knowledge, yet the court can not judicially know that this acceptance was so wholly without knowledge of the facts as to be unimportant.

It is not seriously contended on the part of the Government that the fluid obtained from pressing the evaporated apples, after the water taken therefrom has been restored, is not apple cider. It is suggested that possibly there is some constituent element of the apple removed by the dehydrating process that is never restored thereto. There is no proof of that fact, but there is an admission that even if such consistituent element is removed it is so immaterial and inconsequential in quantity that the science of chemistry can not disclose it. This brings this case clearly within the doctrine announced in U. S. v. Lexington Mill and Elevator Co., supra, to the effect that the burden is upon the Government to establish by the evidence, not merely a technical, but a substantial violation of the Federal food and drug act, which may render the article injurious to health or mislead the public to its prejudice or harm or induce the purchase of a different article than the article desired.

Nor should the fact be overlooked that this is a highly penal statute. The Government in this proceeding is asking the condemnation and forfeiture of ninety-five barrels of vinegar because it is adulterated and misbranded and the burden is upon the Government to establish one or both of these alleged facts.

While the Government is practically conceding in the agreed statement of facts that the liquid obtained from evaporated apples by this method is apple cider, identical in taste, substance, and chemical test with apple cider pressed from the unevaporated apples, except that there may, perhaps, be some constituent element lacking, the quantity, if any, being so small that its absence is not shown by chemical tests, and further conceding that the same has been sold upon the market for many years as apple cider, and that
54 vinegar made therefrom has been an article of commerce, at least since January 1, 1906, under the name and brand of apple cider vinegar and sold in quantities by this one manufacturer alone, aggregating 100,000 barrels a year; nevertheless, it is now insisting that the branding of this product as apple cider vinegar is calculated to deceive and mislead the purchaser into buying an article other than the brand implies.

It may be true that a large part of the purchasing public has no knowledge whatever in reference to the manufacture of cider from evaporated apples and for that reason might have a distinct prejudice against such a method of manufacture. Undoubtedly the pure food and drug act contemplates the protection of the public in this regard, but only to the extent that the public shall not be deceived or misled by the brand into buying an imitation of the article or a substitute for the article indicated by the brand. If, however, it is in truth and in fact buying the identical article indicated by the brand, manufactured from the same basic elements and none other.

the purpose of the statute is accomplished and the process of manufacture is of no importance.

A substantial, if not an exact analogy, may be found in the manufacture of maple syrup. The water is partially evaporated from the sap of a maple tree in order to produce maple syrup. If the evaporation process is continued until sufficient of the water is evaporated, the product is maple sugar. If to this sugar there is added as much water as was evaporated therefrom in the process of reducing maple syrup to maple sugar, and the sugar is dissolved and held in solution, the product again becomes maple syrup. It has been held by the pure food department (Circular 136) that maple syrup manufactured in this way may be properly branded "Maple syrup."

Yet, notwithstanding such syrup responds to the chemical tests, and doubt might be suggested that possibly a constituent element was removed from the maple syrup in the process of reducing it to maple sugar that could not be wholly restored thereto. It is also possible that there might be a popular prejudice against maple syrup manufactured in this way, yet it would hardly be contended that Congress is expending its time in the enactment of laws in furtherance of perpetuating prejudices founded upon mistake and misunderstanding and at war with the conceded facts of the case.

55 Another illustration may test the soundness of the proposition that there is a misbranding of this vinegar. Cream is a substance which, by the unaided process of nature, rises to the top of milk. A generation or two ago this would have been the popular definition. The process of its development was well known and required, at the least, some hours of time and favorable conditions. Then it was discovered that the butterfat can be separated from the milk in a few minutes by a centrifugal separator and that the product is really cream; yet it is at least probable that for some time a substantial part of the public would have refused to buy butterfat in this form unless it had been labeled "cream" and without disclosing the substitution of artificial for natural methods. So the catalogue of present-day foods and those that may fairly be developed will disclose frequent instances of great change in methods of manufacture, or treatment, without any resulting necessity of changing the name of the product.

We get no controlling direction from the decided cases. The salad-oil cases have been mentioned. In the Vinegar Case, 186 Fed. 399, the product was in fact distilled vinegar with a dash of apple cider. It was labeled as a blend of cider vinegar and distilled vinegar. From the view that the court took of the meaning of the label the misbranding was obvious.

In the Tee Pee Apple Case, 179 Fed. 185, the label was considered to mean that the apples were grown in Michigan, and this became a geographical misrepresentation expressly forbidden by the act.

We do not overlook that the New York Supreme Court and the United States District Court for the Eastern District of Wisconsin

have held that claimant's vinegar is misbranded. In each case the opinion seems to be based in part upon inferences and testimony not presented by this record and in part upon judicial knowledge that nothing is apple cider unless it is pressed from fresh apples—an inference wholly inconsistent with the facts here conceded.

For the reasons above stated a majority of the court is of the opinion that the judgment of the district court is not sustained by the agreed statement of facts. The judgment is reversed and cause remanded for further proceedings in accordance with this opinion.

56 In the United States Circuit Court of Appeals, Sixth Circuit.

[Title omitted.]

Petition for rehearing.

To the honorable the United States Circuit Court of Appeals for the Sixth Circuit:

Your petitioner, the United States of America, defendant in error, by its attorneys, respectfully prays this honorable court to grant a rehearing of the above-entitled case for the following reasons:

1. Because the judgment and decision of this honorable court filed herein April 3, 1923, is contrary to law;

2. Because the question thereby decided is of very great
57 public importance in the administration and enforcement of the Federal food and drugs act, and the officials of the United States Department of Agriculture, charged by law with the administration of said statute, believe that there are phases of the issue involved which were not presented for consideration to this court at the hearing or in the briefs or the arguments of counsel heretofore considered, and that a rehearing would afford opportunity for a more adequate presentation of the issue from the Government's standpoint and contribute to a correct settlement of said issue in this and in other Federal jurisdictions where the same is now being litigated.

3. Because counsel for the producers of vinegar from evaporated apples were heard in their behalf amicus curiae in opposition to the Government's contentions; while counsel for producers of vinegar from unevaporated apples, owing to lack of seasonable notice of the time of hearing this case, was unable to apply to this court for a like opportunity to be heard amicus curiae in behalf of the Government's contentions.

4. Because there are trade and economic problems and phases intimately connected with the issue, which due to the aforesaid manner of argument have not been heretofore presented to the court in the briefs and arguments of counsel; and said producers of vinegar from unevaporated apples respectfully submit that their interests

are adversely affected and their business jeopardized by the rendition of this honorable court's decision without a full presentation and discussion of the issue from the standpoint of their important food industry. That in the event that this honorable court shall be pleased to grant a rehearing of this case said producers will be represented by the general counsel of their trade organization, the American Cider and Vinegar Manufacturers' Association, with headquarters at Rochester, New York, who will apply to be heard herein, amicus curiæ.

58 5. Because this honorable court erred by holding and deciding in substance and effect, that the judgment of the District Court was not sustained by the facts stipulated, inasmuch as those facts contained in the stipulation which were material to the issue were alleged in petitioner's libel and were held sufficient upon demurrer, which said ruling of the District Court upon demurrer, though excepted to, is not referred to or overruled in the opinion and decision rendered herein by this honorable court.

6. Because this honorable court erred by failing to sustain the finding of the District Court that the vinegar libelled was not cider vinegar, identical with that vinegar represented by exhibits submitted to said court and conceded to be genuine apple cider vinegar, inasmuch as said finding was a reasonable inference of fact fairly deducible from the admitted facts and not subject to be set aside by this court because it disagreed with said conclusion.

7. Because this honorable court erred by failing to hold and decide that misbranding under the food and drugs act must be determined by construing descriptive words appearing upon labels of food and drug articles according to the ordinary meaning and popular signification of such words to the mind of the purchasing public rather than according to the technical or trade meaning which said words may have acquired among manufacturers and vendors of these commodities.

8. Because this honorable court erred in holding and deciding in substance and effect that the definition of the terms "Apple cider vinegar" in their ordinary and popular signification is not properly a subject of judicial notice.

59 9. Because this honorable court erred in holding and deciding that the definition of the terms, "Apple cider vinegar" judicially noticed by the District Court and applied by said court in the determination of the issue before it, was incorrect in any particular.

10. Because this honorable court erred in holding and deciding in substance and effect upon the pleadings and stipulated facts herein that the trade or technical meaning or any secondary meaning whatsoever of the terms "Apple cider vinegar" was involved as a material issue in this case.

11. Because this honorable court erred in holding and deciding as a matter of law upon the record herein that the ordinary and popular signification of the terms "Apple cider vinegar" could be altered

by the trade practice or usage of manufacturers or vendors of vinegar of labeling vinegar produced from evaporated apples as "Apple cider vinegar," without a disclosure to the purchasing public of the fact that such vinegar was made from evaporated apples.

12. Because this honorable court erred in holding and deciding as a matter of law upon the record herein that the character of raw material used in the production of the vinegar libelled, the chemical treatment to which it was subjected, and the process by which it was manufactured, were negligible factors in determining the commercial identity of the article with the concept of genuine apple cider vinegar, held by the purchasing public.

13. Because this honorable court erred by holding in substance and effect that in order to constitute a misbranding under the Federal food and drugs act the label must be such as to deceive the purchaser of an article of food or drugs to his substantial injury.

14. Because this honorable court erred by holding in substance and effect that it was not the purpose of Congress in legislating against misbranding, to protect ultimate purchasers of articles of food
60 or drugs against deceit, when exercising their right of choice or selection among different brands, grades or varieties of the same commodity, even though the exercise of this choice be governed by whim or prejudice, and not upon considerations of composition and quality.

15. Because this honorable court erred in failing to hold that the vinegar libelled was both adulterated and misbranded within the meaning of the food and drugs act, June 30, 1906.

16. Because this honorable court erred by not affirming the judgment of the District Court in this case.

A. E. BERNSTEEN,
United States Attorney in and for the Northern District of Ohio.
GERARD J. PILLIOD,
Assistant United States Attorney in and for the Northern District of Ohio.
Attorneys for Petitioner.

61 [Jurat showing the foregoing was duly sworn to by A. E. Bernsteen and Gerard J. Pilliod omitted in printing.]

62 United States Circuit Court of Appeals for the 6th Circuit.

Order extending time to file brief as amici curiae.

Filed May 19th, 1923.

Counsel for the producers of vinegar from unevaporated apples are permitted, as amici curiae, to file within fifteen days a brief in support of the Government's petition for rehearing.

Order extending time to file brief as amici curiae.

Filed June 4, 1923.

The time for filing brief on behalf of the producers of vinegar from unevaporated apples, as amici curiae, upon the petition for rehearing herein is hereby extended for a period of ten days.

United States Circuit Court of Appeals for the 6th Circuit.

Order denying petition for rehearing.

Filed June 29, 1923.

The petition for the rehearing of this cause is hereby denied.

63 United States Circuit Court of Appeals for the 6th Circuit.

Order extending time to file petition for rehearing.

Filed April 27, 1923.

Upon application of the United States attorney the time within which to file petition for rehearing is extended to and including the 15th day of May, 1923.

Petition for rehearing.

Filed May 14th, 1923.

64 United States Circuit Court of Appeals for the Sixth Circuit.

Clerk's certificate.

I, Arthur B. Mussman, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Ninety-five barrels of vinegar, etc., vs. United States of America, No. 3835, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 26th day of July, A. D. 1923.

[SEAL.] ARTHUR B. MUSSMAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

65 *Writ of certiorari and return.*

Filed Nov. 6, 1923.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Ninety-five barrels, more or less, alleged apple cider vinegar (Douglas Packing Company, claimant), is plaintiff in error, and the United States of America is defendant in error, No. 3835, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

66 Do hereby command that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT, *ss:*

I, Arthur B. Mussman, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within-entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 3rd day of November, A. D. 1923, there was filed in my office a stipulation in the above-entitled case in the following words, to wit:

In the Supreme Court of the United States, October Term, 1923.

[Title omitted.]

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Sixth Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.
JOHN G. WHITE,
A. V. CANNON,
L. C. SPIETH,
WHITE, CANNON & SPIETH,
Counsel for Respondent.

Oct. 30, 1923.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official signature and the seal of said Circuit Court of Appeals at the city of Cincinnati, Ohio, in said circuit this 3rd day of November, A. D. 1923.

[SEAL.] ARTHUR B. MUSSMAN,
Clerk United States Circuit Court of Appeals, Sixth Circuit.

67 [File endorsement omitted.]

68 [File endorsement omitted.]

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